No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a *cy pres* theory, is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2).

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INTEREST OF THE UNITED STATES

This case presents the question whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a *cy pres* theory, should be approved as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). The United States has a substantial interest in the resolution of that question. Under 28 U.S.C. 1715, class-action defendants seeking court approval of settlements must notify the Attorney General or other designated federal official of the settlement terms. Consistent with its interests in protecting consumers and ensuring the fair disposition of class actions—particularly those that aggregate federal claims—the United States has filed statements of interest in district courts raising concerns

about particular settlements. Although the government has not yet submitted a statement raising concerns about the use of *cy pres* relief in class-action settlements, the Attorney General has issued a memorandum directing Department of Justice litigating entities not to enter *cy pres* settlements. Many of the principles underlying that decision are relevant to the question presented here. The government has participated in multiple cases before this Court involving class-action rules and practices. See, *e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663 (2016); *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455 (2013).

STATUTORY PROVISIONS AND RULES INVOLVED

As especially relevant here, Federal Rule of Civil Procedure 23(e)(2) provides: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: * * * If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."

This Court has approved amendments to Rule 23 that will take effect on December 1, 2018, if Congress does not modify them. The amended version of Rule 23(e)(2) submitted to Congress is reproduced in this brief's appendix, along with other pertinent statutory provisions and rules. App., *infra*, 1a-12a. Material differences in the amended rule are discussed further below.

STATEMENT

1. a. Plaintiffs bringing a class action under Federal Rule of Civil Procedure 23 must meet several "threshold requirements." *Amchem Prods., Inc.* v. *Windsor*,

521 U.S. 591, 613 (1997). First, under Rule 23(a), the class representatives must show "numerosity," "commonality," "typicality," and "adequacy of representation." *Ibid.* Next, plaintiffs "must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614. As relevant here, Rule 23(b)(3) authorizes a court to certify a class if plaintiffs show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In a class action certified under Rule 23(b)(3), the district court must provide notice to class members informing them that they have right to "request[] exclusion" from the class. Fed. R. Civ. P. 23(c)(2)(B)(v). The notice must also inform class members that they will be subject to "the binding effect of a class judgment" if they do not exercise their opt-out right. Fed. R. Civ. P. 23(c)(2)(B)(vii); see Fed. R. Civ. P. 23(c)(3)(B).

b. "Like all American litigation, class action lawsuits are likely to settle." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:1, at 273 (5th ed. 2014) (*Newberg*). Unlike a typical settlement, however, a class-action settlement inherently involves a potential conflict of interest, because it "compromises the claims of absent class members, litigants not themselves part of the settlement negotiations." *Id.* at 273-274. "Worse, the class representatives and class counsel litigating on behalf of those absent class members may have incentives to settle which conflict with the class's interests." *Ibid.* In particular, class counsel have a "pecuniary interest * * * in their fees," while class members have a "pecuniary interest * * * in the award to the class," which

can result in an "acute conflict of interest." *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014).

To protect the rights of absent class members against these potential conflicts, Rule 23(e) provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A court reviewing a class-action settlement serves as a "fiduciary of the class," *Pearson*, 772 F.3d at 780 (citation omitted), and must keep "the interests of absent class members in close view," *Amchem*, 521 U.S. at 629; see Fed. Judicial Ctr., *Manual for Complex Litigation* § 21.61, at 310 (4th ed. 2004) (Manual) ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.").

Specifically, a district court considering a class-action settlement "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Any "class member may object to" the settlement, Fed. R. Civ. P. 23(e)(5), and the court "may refuse to approve a settlement unless it affords a new opportunity" for class members in a Rule 23(b)(3) class action to opt out, Fed. R. Civ. P. 23(e)(4). Of particular relevance here, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). A court may also "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

To facilitate judicial consideration of a class-action settlement, the parties "must file a statement" with the district court identifying the settlement agreement.

Fed. R. Civ. P. 23(e)(3). In addition, within ten days of filing the proposed settlement, the class-action defendant must serve specified federal and state officials with the settlement and other case-related documents. 28 U.S.C. 1715(b). The court may not finally approve the settlement "earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served" with the required notice. 28 U.S.C. 1715(d).

c. Rule 23(e)(2) does not specify particular criteria that a court must consider in determining whether a proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The advisory committee notes, however, state that "[f]urther guidance can be found in the [Manual]." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendment). The Manual explains that "[j]udicial review" of class-action settlements "must be exacting and thorough," and it outlines "a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements." § 21.61, at 309-310.

Notably, the Manual highlights a settlement "releasing claims of parties who received no compensation in the settlement" as one of the "potential abuses" of which the court should be "wary." § 21.61, at 310-311; see *Newberg* § 13:56, at 490 (citing "compromising claims without compensation" as a "red flag[]"). Such a settlement often arises when the parties agree to *cy pres* relief, which "permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries for the indirect benefit of the class." Pet. App. 7 (citation omitted); see *Newberg* § 12:32, at 238-242. Although *cy pres* remedies "are a growing feature of class-action settlements,"

this Court "has not previously addressed" when such remedies are appropriate. *Marek* v. *Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). Some courts of appeals, however, have "criticized and severely restricted the practice." *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (collecting authorities).

2. This case arises from consolidated class actions filed against respondent Google, Inc. See Pet. App. 3. In the first action, plaintiff (now respondent) Paloma Gaos challenged the manner in which Google operates its search engine, specifically its disclosure of users' search terms through a "referrer header" when a user clicks on a link after conducting a Google search. *Id.* at 4. Gaos alleged that such disclosure violates the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, which prohibits certain service providers from divulging the contents of communications. 18 U.S.C. 2702(a)(1) and (2); see J.A. 18, 28. She also asserted various state-law claims. J.A. 18.

The district court dismissed the state-law claims for lack of Article III standing, reasoning that Gaos had failed to identify any injury-in-fact resulting from Google's dissemination of referrer headers. J.A. 26-27. With respect to the federal claims, however, the court concluded that Gaos had standing. J.A. 27-31. Relying on then-extant circuit precedent, the court reasoned that "the injury required by Article III * * * can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" J.A. 27 (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. dismissed, 567 U.S. 756 (2012)) (per curiam). Because the SCA creates a private right of action and a statutory-damages remedy, see 18 U.S.C. 2707(a) and

(c), the court concluded that Gaos had adequately alleged an Article III injury. J.A. 29. Gaos subsequently amended her complaint to add another class representative, respondent Anthony Italiano, and the district court consolidated another class action raising similar claims filed by respondent Gabriel Priyev. See J.A. 82, 84-85. The district court did not expressly address the standing of Italiano or Priyev.

3. a. The parties reached a settlement agreement. See Pet. App. 69-111. As relevant here, plaintiffs Gaos, Italiano, and Priyev agreed to dismiss their class actions and release their claims in return for two steps by Google.

First, Google agreed to pay $8.5 million into a settlement fund. Pet. App. 82-83. That fund would be used to pay attorney's fees (ultimately about $2.125 million), to provide "incentive awards" to each of the individual class representatives, and to pay administrative costs of about $1 million. *Id.* at 41; see *id.* at 83-84. The remainder of the fund (about $5.3 million) would be distributed as *cy pres* relief to several academic or non-profit institutions "to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *Id.* at 84; see *id.* at 5. The agreement did not provide for any direct compensation to members of the class.

Second, Google agreed to "maintain information on its website" disclosing "how information concerning users' search queries are shared with third parties." *Id.* at 40; see *id.* at 82. Google, however, was "not required to make changes to its homepage * * * or to practices or functionality of Google Search" or other aspects of its website. *Id.* at 40; see *id.* at 82.

b. The district court granted preliminary certification of the class under Rule 23(b)(3) and preliminary approval of the settlement under Rule 23(e)(2). J.A. 82-100. When class members were notified of the settlement, four objected, including petitioners. Pet. App. 34, 112-150. Among other objections, petitioners argued that *cy pres* relief was inappropriate because "it would be practicable to distribute" the settlement fund "through a lottery or claims-made process." *Id.* at 121. Petitioners also argued that the *cy pres* award was improper because "class counsel are the alumni of several of the *cy pres* recipients," creating "the appearance of divided loyalties of class counsel." *Id.* at 125.

c. After a hearing, the district court certified the class for settlement, granted final approval of the settlement, overruled petitioners' objections, and awarded attorney's fees to class counsel. Pet. App. 34-60.

The district court first concluded that the class could be certified for settlement under Rule 23(b)(3) because the proposed class action was "a superior process" for litigating the claims of a "class comprised of approximately 129 million individuals who all share a common injury." Pet. App. 35-36. In the court's view, "[t]he alternatives to class certification—millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members—were not preferable." *Id.* at 36.

The district court next determined that the settlement was "fair, adequate, and reasonable" under Rule 23(e)(2). Pet. App. 41; see *id.* at 39-50. The court observed that plaintiffs' SCA claims were "legally unproven, technically complex and potentially of little value." *Id.* at 44. The court concluded that *cy pres* relief was appropriate because the settlement fund was "non-distributable"

given the large size of the class, *id.* at 47, and the proposed *cy pres* distribution was acceptable because it "bears a substantial nexus to the interests of the class members," *ibid.* (quoting *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), cert. denied, 571 U.S. 1003 (2013)). The court granted $2.125 million in attorney's fees, which was "equal to 25% of the" $8.5 million settlement fund. *Id.* at 54.

4. The court of appeals affirmed. Pet. App. 1-23. All three panel members agreed with the "district court's finding that the settlement fund was non-distributable." *Id.* at 8; see *id.* at 23 (Wallace, J., concurring in part and dissenting in part). The court explained that the settlement fund, after subtracting attorney's fees and other expenses, "was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one." *Id.* at 9. The court rejected petitioners' contention that the settlement fund could have been distributed through a claims process, explaining that its "review of the district court's settlement approval [wa]s not predicated simply on whether there may be 'possible' alternatives," but rather on "whether the district court discharged its obligation to assure that the settlement [wa]s 'fair, adequate, and free from collusion.'" *Id.* at 9-10 (quoting *Lane*, 696 F.3d at 819) (citation omitted).

The panel divided over "whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients." Pet. App. 11. The majority recognized that "Google has in the past donated to" and directed "settlement funds" to several of the *cy pres* recipients, and that "three of the *cy pres* recipients are

organizations housed at class counsel's *alma maters*." *Id.* at 13. The majority concluded, however, that none of those prior affiliations raised "substantial questions about whether the selection of the recipient was made on the merits." *Id.* at 14 (citation omitted). Judge Wallace dissented on that point, concluding that "the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further." *Id.* at 23 (Wallace, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

This Court granted the petition for a writ of certiorari to consider when a class-action settlement that incorporates *cy pres* relief is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). There is, however, considerable doubt whether the Court has Article III jurisdiction to address that question, because plaintiffs' standing in the district court depended on a theory of injury that this Court subsequently rejected in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). The Court accordingly may wish to remand the case for the lower courts to address the standing question in the first instance.

If the Court addresses the merits, it should vacate the decision below and remand for more rigorous scrutiny of the *cy pres* relief in the settlement. As explained further below, *cy pres* relief has little basis in history, creates incentives for collusion, and raises serious questions under Article III. A court should approve a class-action settlement that includes *cy pres* relief only in rare circumstances after careful examination to determine whether several important limitations are satisfied. Specifically, *cy pres* distributions are permissible

only if they redress plaintiffs' injuries and only if there is no non-arbitrary way to distribute settlement funds to allegedly injured class members. In addition, settlement funds distributed through *cy pres* rather than directly to class members should be discounted in calculating attorney's fees. Because the courts below applied an overly permissive standard in approving the *cy pres* settlement in this case, this Court should vacate and remand for further proceedings.

ARGUMENT

THIS COURT SHOULD VACATE THE DECISION BELOW AND REMAND FOR THE LOWER COURTS TO ADDRESS STANDING OR CONDUCT FURTHER REVIEW OF THE *CY PRES* RELIEF IN THE SETTLEMENT

A. A Substantial Jurisdictional Question Exists

Although no party raised a jurisdictional objection in the court of appeals or at the certiorari stage, this Court has an "obligation to satisfy itself * * * of its own jurisdiction * * * even though the parties are prepared to concede it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation and internal quotation marks omitted). Article III jurisdiction "must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). This Court therefore has "an obligation * * * to inquire not only into [its own] authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." *Id.* at 73; see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (explaining that this Court has "an obligation to assure [itself] that [plaintiffs] had Article III standing at the outset of the litigation").

1. This Court has recognized that "Article III constraints" apply in the class-action settlement context. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citation omitted); see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997). Specifically, courts "evaluate standing for the purposes of class certification and settlement approval under Rule 23." *In re Deepwater Horizon*, 739 F.3d 790, 800 (5th Cir.) (collecting cases), cert. denied, 135 S. Ct. 754 (2014); see 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1785.1 (3d ed. 2005 & Supp. 2018). And courts of appeals have vacated district court approvals of class-action settlements that failed to address Article III standing. See, *e.g.*, *Central States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 203 (2d Cir. 2005).

Article III constraints apply to the district court actions under review here. The court granted class certification, approved the settlement, and entered a judgment dismissing the action with prejudice. Pet. App. 62-66. The judgment imposed the terms of the settlement, including the *cy pres* provisions and the release of plaintiffs' claims, as "binding" on the parties, with "*res judicata* and preclusive effect." *Id.* at 64. The court also retained "jurisdiction to oversee the implementation and enforcement of the Settlement." *Id.* at 65. The court could not perform those actions if it lacked Article III jurisdiction. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994); cf. *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). Indeed, the

district court's judgment stated that it had "appropriate subject matter jurisdiction over this action." Pet. App. 63.

No exception to the need for an Article III standing inquiry applies here. Under this Court's precedent, certain class-certification issues may be considered before Article III standing when "their resolution * * * is logically antecedent to the existence of any Article III issues." *Amchem*, 521 U.S. at 612. But the propriety of class certification is not logically antecedent to the Article III issue here—whether the named plaintiffs had standing to bring their claims in the first place. The court of appeals' decision upholding approval of the settlement can thus be affirmed only if plaintiffs actually had Article III standing in the district court.

2. There is a substantial question about whether plaintiffs had such standing. Article III requires a plaintiff to allege an "injury in fact" that is both "'concrete'" and "'particularized.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). Plaintiffs here allege that they suffered "actual harm in the form of Google's unauthorized and unlawful dissemination of [their] search queries, which sometimes contained sensitive personal information, to third parties." Consolidated Compl. (Compl.) ¶¶ 104, 111, 118. The district court determined that this allegation, which at the time was asserted only by plaintiff Gaos, did not constitute "injury sufficient for Article III standing with respect to" the state-law claims. J.A. 27. But the court concluded that Gaos's SCA claim sufficed to create standing because "[t]he injury required by Article III * * * can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Ibid.* (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. dismissed, 567 U.S. 756 (2012) (per

curiam)). Specifically, the court concluded that "a violation of one's statutory rights under the SCA is a concrete injury," even "without additional injury." J.A. 29. The court did not separately address standing based on the substantially similar allegations asserted by plaintiffs Italiano and Priyev.

In *Spokeo*, this Court vacated a Ninth Circuit decision that relied on the same reasoning as the district court here. 136 S. Ct. at 1545; see *id.* at 1546 n.5 (citing *Edwards*, 610 F.3d at 514). The Court rejected the premise that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. Rather, the Court explained, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.* To qualify as "'concrete,'" an "injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548. The "requirement of concreteness," however, may be satisfied by an "intangible" injury or "the risk of real harm." *Id.* at 1549. And "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Ibid.*

Here, it is unclear whether any injury alleged by any plaintiff satisfies the injury-in-fact requirement as elucidated in *Spokeo*. Plaintiffs do not appear to identify any particular injury that actually resulted from Google's use of referrer headers. See Google Br. in Opp. 2-3 (citing plaintiffs' "lack of injury" and suggesting that their allegations would not suffice to create standing after *Spokeo*); *id.* at 23 (stating that "plaintiffs failed to allege any actual harm that they or class members suffered as a result of the challenged practices");

see also D. Ct. Doc. 44, at 3 (June 14, 2012) (Google arguing that "[s]hould the Supreme Court reverse the *Edwards* decision, the [district court] should dismiss Plaintiffs' SCA claim based on * * * lack of standing.").[1] Plaintiffs contend instead that a website operator could learn their identity and their search queries through "reidentification," Compl. ¶¶ 4, 83-91, and they provide examples of search terms that allegedly create privacy-related harms, see Compl. ¶¶ 101, 107. The lower courts did not address whether such allegations present a "risk of real harm" sufficient to create Article III standing. *Spokeo*, 136 S. Ct. at 1549; cf. *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1112-1117 (9th Cir. 2017) (finding, on remand from this Court, that plaintiffs' asserted injury under federal consumer privacy statute was sufficiently concrete to support standing), cert. denied, 138 S. Ct. 931 (2018). This Court accordingly may wish to remand the case for the lower courts to address standing in the first instance. Cf. *Kremens* v. *Bartley*, 431 U.S. 119, 128-130 (1977) (finding claims of named plaintiffs in class action mooted by intervening development in the law and remanding for further analysis with respect to other class members).

B. Class-Action Settlements Relying On *Cy Pres* Require Careful Scrutiny And Should Be Approved Only When Certain Limitations Are Met

If the Court addresses the merits, it should hold that class-action settlements relying on *cy pres* distributions

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[1] Google withdrew its standing argument after this Court dismissed the petition for a writ of certiorari in *Edwards* as improvidently granted. See D. Ct. Doc. 46, at 2 n.2 (Aug. 2, 2012). Google later notified the court of appeals of this Court's decision in *Spokeo*, which came after the appeal had been briefed. See C.A. Doc. No. 41-1 (May 25, 2016).

require careful examination and should be approved as "fair, reasonable, and adequate" under Rule 23(e)(2) only in rare circumstances when certain limitations are satisfied.

1. The history and logic of cy pres *do not support its use in class-action settlements*

The *cy pres* doctrine "takes its name from the Norman French expression *cy pres comme possible*," or "as near as possible." Pet. App. 7. *Cy pres* "developed originally in the law of trusts, where it is deeply rooted." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 624 (2010) (Redish). In that "original context," the need for *cy pres* arose when it became "impossible or impractical" to use a charitable donation for its intended purpose "because of exigent circumstances." *Id.* at 625. Courts developed *cy pres* "to give effect to the testator's intent by putting the funds to the next closest use." *Ibid.* For example, "the March of Dimes Foundation, which was initially established to treat polio victims[,] * * * was permitted to alter its mission to combat other childhood diseases once the polio vaccine was developed and the donors' precise intent could no longer be effectuated." Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 114-115 (2014) (Wasserman).

As a trust-law doctrine with centuries-old roots, *cy pres* "was never thought to have anything to do with the structuring of relief awarded against a defendant who had been judicially found in an adversary proceeding to have violated the legal rights of the plaintiff." Redish 630. Nevertheless, in the 1970s, some courts began to import the concept of *cy pres* from trust law to "the class action context." Wasserman 116. Even then,

courts "originally contemplated" that *cy pres* "would be used only in large classes with unclaimed remainders," on the theory that distributing unclaimed funds to charities would be preferable to allowing the funds to revert to the defendant. Redish 633. Over time, however, "litigants and courts have enthusiastically latched onto cy pres," Wasserman 117, as a mechanism not only for distributing unclaimed settlement funds, but also for structuring settlements to direct *all* funds to *cy pres* recipients (and class counsel), thereby leaving class members "no recovery at all," American Law Institute, *Principles of the Law: Aggregate Litigation* § 3.07 cmt. a, at 218 (2010) (*ALI Principles*). The "*cy pres*-only distribution" in this case is a typical example. Pet. App. 7.

Such settlements are irreconcilable with the logic of *cy pres* as historically understood. Because the need for *cy pres* arose only when a donor's intent was frustrated, there was no such thing as a voluntary *cy pres* agreement or award. See *Newberg* § 12:32 n.7, at 239 (calling application of *cy pres* to class-action settlements "beguiling" because "*cy pres* evolved in trust law from the *absence* of specific direction"); see also *Klier* v. *Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) ("It is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement."); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (explaining that a *cy pres* class-action settlement is "badly misnamed"). Applying the *cy pres* doctrine to class-action settlements of the kind at issue here therefore has no basis in history or equity practice.

2. *Use of* cy pres *in class-action settlements raises serious concerns that warrant additional analysis*

Aside from its historical novelty, the extension of *cy pres* to class-action settlements raises "fundamental concerns" about the fairness of such relief. *Marek* v. *Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari); see *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (explaining that some courts of appeals have "criticized and severely restricted the practice"); Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 17 (3d ed. 2010) (identifying *cy pres* relief as a "hot button indicator[]" showing "potential unfairness" in a class-action settlement).

First, *cy pres* relief provides no direct compensation to members of the plaintiff class. That is a significant "red flag[]," because the plaintiffs' injuries are the basis for the lawsuit. *Newberg* § 13:56, at 489; see Manual § 21.61, at 310-311 ("Releasing claims of parties who received no compensation in the settlement" is a "potential abuse[]" of which a court should be "wary."). Class members are thus "presumptively" entitled to a share of the "funds generated through the aggregate prosecution of [their] claims," which are typically released by the settlement. *ALI Principles* § 3.07 cmt. b, at 218; see *Klier*, 658 F.3d at 474. But in a *cy-pres* only settlement like the one at issue here, injured class members receive no funds in exchange for the release of their claims. Rather, a *cy pres* distribution provides relief only "imperfectly," by "substituting for * * * direct compensation an indirect benefit that is at best attenuated and at worse illusory." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Second, *cy pres* settlements exacerbate "the perennial risk of collusion" between the parties at the expense of absent class members. Wasserman 123; see *Mirfasihi*, 356 F.3d at 785 (noting that "class actions are rife with potential conflicts of interest between class counsel and class members"). By shifting the focus of settlement negotiations from the value of plaintiffs' claims to the amount and destination of a charitable contribution, the prospect of *cy pres* relief distorts incentives for class counsel and defendants alike. Class counsel often receive attorney's fees calculated as a percentage of the overall settlement fund, and "a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. The incentive to maximize the *cy pres* amount rather than negotiate for more direct relief to the class creates a "potential conflict of interest between class counsel and their clients." *Ibid.*; see *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (describing the "acute conflict of interest" between class counsel's "pecuniary interest * * * in their fees" and class members' "pecuniary interest * * * in the award to the class").

From the defendant's perspective, *cy pres* relief offers the prospect of "a reputational boost from large charitable contributions" without an admission of wrongdoing to class members or the public. *Newberg* § 12.32, at 243 (emphasis omitted); see Wasserman 120 ("Typically, when a defendant makes a donation to charity in lieu of direct payments to class members, the defendant enjoys the good will and good publicity (and possibly even the tax deduction) associated with making a charitable gift, while the class members may receive little, if any, benefit from the charity's activities."). The risk of

collusion is especially high where, as here, the defendant already contributes to the *cy pres* recipients, see Pet. App. 13-14, and thus may view the *cy pres* payment as little more than a change in accounting, see *Mirfasihi*, 356 F.3d at 785 ("[W]hat may be going on here is that class counsel wanted a settlement that would give them a generous fee and [the defendant] wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself.").

Third, *cy pres* relief creates a risk of self-dealing—or the appearance of self-dealing—by parties and, potentially, the court. See Wasserman 124-125. By allowing the parties or the court to select the recipients of charitable contributions, *cy pres* relief opens the door to apparent favoritism toward entities with which the parties or the court have prior affiliations, such as an *alma mater* or favorite local charity. See *id.* at 124-125 & nn.116-120 (citing examples); Pet. App. 30 (Wallace, J., concurring in part and dissenting in part) (discussing appearance of potential self-dealing by counsel in this case); see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38 (1st Cir.) ("[H]aving judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety."), cert. denied, 568 U.S. 932 (2012).

Fourth, *cy pres* remedies in class actions involving federal statutory claims often conflict with the remedies specified by Congress in the underlying substantive law. See Redish 644-650. "The private causes of action aggregated in this class action—as in many others—were created by Congress to allow plaintiffs to recover * * * damages for their injuries." *Baby Prods.*, 708 F.3d at 173; see 18 U.S.C. 2707(c) (providing for statutory damages). But the *cy pres*-only settlement here did not

provide any compensation to plaintiffs. It instead provided compensation to non-parties. Such a remedy is not expressly authorized by the underlying substantive statute, Rule 23, or any other affirmative source of law. Cf. 28 U.S.C. 1712(e) (authorizing courts to order a form of *cy pres* relief in certain settlements involving coupons).

In light of these and other concerns, see Pet. Br. 28-39, this Court should direct lower courts to conduct additional analysis in determining whether a class-action settlement that includes *cy pres* relief is "fair, reasonable, and adequate" under Rule 23(e)(2). In an ordinary settlement that does not involve *cy pres* relief, the Rule 23(e)(2) analysis typically focuses on the amount of the settlement and the strength of the plaintiffs' claims. See *Newberg* § 13.48, at 457. But when a settlement includes a *cy pres* component, a court must not only analyze the size of the payment and the strength of the claims, but must also determine whether the parties have shown a sufficient justification for directing the relief to an entity other than the plaintiffs. As explained further below, in applying that "increased scrutiny," *Baby Prods.*, 708 F.3d at 173, courts should ensure that certain conditions are satisfied before approving a settlement that includes *cy pres* relief, which will often require courts to make specific findings about the ability of *cy pres* recipients to redress putative violations, the feasibility of direct distributions to the class, and the extent to which the *cy pres* distribution should be considered in calculating attorney's fees.

Recognizing the potential for abuse inherent in *cy pres* settlements, the Attorney General recently directed litigating entities within the Department of Justice not to enter settlements that provide payment to non-parties, including through *cy pres* relief, except in

narrow circumstances. Memorandum from Jefferson B. Sessions III, U.S. Att'y Gen., regarding Prohibition on Settlement Payments to Third Parties (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download. As the Attorney General explained, the "goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct." *Ibid.* By compensating victims for their harm only indirectly (if at all) and by allowing defendants to replace payments to injured plaintiffs with donations to charities or other preferred third parties, *cy pres* relief runs counter to those basic settlement purposes. See *ibid.* The same principles that led the Department of Justice to stop entering into *cy pres* settlements counsel in favor of careful judicial scrutiny before approving *cy pres* settlements under Rule 23(e)(2). See, *e.g.*, *In re BankAmerica*, 775 F.3d at 1067 (applying "rigorous standards" in reviewing *cy pres* components of settlement).

3. In conducting scrutiny of cy pres *settlements, courts should enforce several limitations*

In conducting the required scrutiny of settlements that include *cy pres* distributions, courts should enforce at least three important limits on the use of such relief.

a. Cy pres *distributions are permissible only if they redress plaintiffs' injuries*

As a threshold matter, a court may not approve a *cy pres* settlement unless the *cy pres* relief redresses plaintiffs' injuries. This limitation flows from both Article III and Rule 23.

i. Under Article III, a court must "confine[] itself to its constitutionally limited role of adjudicating actual

and concrete disputes, the resolutions of which have direct consequences on the parties involved." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (citation omitted). In a class action, the parties involved do not include *cy pres* recipients who were not injured and did not join the lawsuit. A court has no Article III authority over such entities, which are "not parties to the case." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (plurality opinion). Accordingly, *cy pres* relief complies with Article III only if it has "direct consequences on" the plaintiffs themselves. *Sanchez-Gomez*, 138 S. Ct. at 1537 (citation omitted). Specifically, plaintiffs must demonstrate "redressability—a likelihood that the requested relief will redress the[ir] alleged injury." *Steel Co.*, 523 U.S. at 103.

In the context of *cy pres* class-action settlements, redressability will generally require two showings. First, plaintiffs must show either a present, "continuing violation" that causes injury or "the imminence of a future violation" that would inflict the same injury. *Steel Co.*, 523 U.S. at 108; see *Laidlaw*, 528 U.S. at 187-188; *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107-108 (1983). Otherwise, a payment to a third party could not redress plaintiffs' injury and could not be ordered consistent with Article III, which requires that a "remedy must * * * be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1921 (2018) (citation omitted); see, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 360 (1996) (Courts generally lack power to order a remedy "beyond what [i]s necessary to provide relief" for the particular injury plaintiffs assert.); *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of * * * relief is dictated by the extent of the violation established.").

Second, plaintiffs must show that the *cy pres* recipient will use the funds in a way that makes it "likely, as opposed to merely speculative," that the specific injury asserted by plaintiffs "will be redressed." *Laidlaw*, 528 U.S. at 181. That means showing that a defendant's payment to a *cy pres* recipient—like the civil penalty paid to the government that this Court found sufficient to create Article III standing in *Laidlaw*—will "encourage [the] defendant[] to discontinue current violations" against the plaintiffs and "deter [the defendant] from committing future ones" against the plaintiffs. *Id.* at 186. In sum, before a court can approve a *cy pres* settlement under Rule 23(e)(2), it must find that the *cy pres* relief is likely to redress the specific injuries asserted by the plaintiffs in the class-action litigation.

Cy pres distributions that have a more "insubstantial" or "remote" effect on the injured plaintiffs would raise serious questions under Article III. *Laidlaw*, 528 U.S. at 186; see *id.* at 204 (Scalia, J., dissenting) ("[T]he traditional business of Anglo-American courts is relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff."). Thus, for instance, a *cy pres* distribution that does no more than "sufficiently approximate[] the interests of the class," *In re BankAmerica*, 775 F.3d at 1067, or provide exclusively "emotional" relief, *Mirfasihi*, 356 F.3d at 783-784, cannot satisfy the redressability requirement. Likewise, *cy pres* relief to an organization that advocates for general environmental protections would not redress the injury of a plaintiff who alleges harm to a particular forest; nor would a *cy pres* award to an organization devoted to opposing police brutality redress the injuries of a plaintiff challenging a particular

police technique. Cf. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 494 (2009); *Lyons*, 461 U.S. at 107-108.

Applying this rule would lead courts to disapprove a considerable number of *cy pres* settlements, as some courts have done under relatively similar approaches. For example, the Seventh Circuit disapproved a *cy pres* settlement that directed payment to an orthopedic research foundation in part because the court found it "hopelessly speculative" that the payment would benefit class members allegedly injured by the false advertising of nutritional supplements. *Pearson*, 772 F.3d at 784; see *Dennis* v. *Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (rejecting *cy pres* settlement of false-advertising claims that directed payments to charities that feed the needy because the *cy pres* organizations were not "dedicated to protecting consumers from, or redressing injuries caused by, false advertising"). Other courts, however, have incorrectly approved *cy pres* settlements that did not redress the plaintiffs' specific asserted injuries. See, *e.g.*, *Kritzer* v. *Safelite Solutions, LLC*, No. 10-cv-729, 2012 WL 1945144, at *10 (S.D. Ohio May 30, 2012) (approving settlement in a wage-and-hour case directing *cy pres* relief to charities including the National Wildlife Federation and Habitat for Humanity); *Jones* v. *National Distillers*, 56 F. Supp. 2d 355, 359-360 (S.D.N.Y. 1999) (approving settlement in securities-fraud case that directed *cy pres* relief to the Legal Aid Society).

ii. Similar limitations follow from Rule 23, which "must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 613. A settlement cannot be "fair, reasonable, and adequate" if it provides no more than a speculative prospect of redressing plaintiffs' injuries. Fed. R. Civ. P. 23(e)(2). Similarly, a set-

tlement that delivers no more than the speculative possibility of relief to class members cannot support class certification under Rule 23(b)(3) because a class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" if it results in no relief whatsoever. Fed. R. Civ. P. 23(b)(3). Even if the alternative to a class action is that the plaintiff would not bring a lawsuit at all, a class action that yields no relief is still not "superior" to that alternative. *Ibid.*

b. Cy pres *distributions are permissible only if there is no non-arbitrary way to distribute the settlement funds to class members*

As explained above, the injuries allegedly suffered by class members are the source of a court's Article III jurisdiction to entertain a class action suit. It follows that class members are entitled to receive direct distribution of the settlement funds, if economically feasible in a non-arbitrary way, before those funds are redistributed to non-injured non-parties. A contrary approach would not only be unfair to class members; it would contradict the core premise of *cy pres* as a second-best remedy that "arises only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Klier*, 658 F.3d at 475.

The preference for direct distributions to class members is reflected in the *ALI Principles*, which state that "settlement proceeds should be distributed directly to individual class members" if "individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable." § 3.07(a), at 217. Multiple courts of appeals have adopted that approach expressly or in substantial part. See *In re BankAmerica*, 775 F.3d at 1064 (adopting *ALI Principles*); *Klier*,

658 F.3d at 475 (same); see also *Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members."); *Baby Prods.*, 708 F.3d at 173-174 (explaining, without fully adopting *ALI Principles*, that "direct distributions to the class are preferred over *cy pres* distributions").

Moreover, the amended version of Rule 23(e)(2) recently approved by this Court at least implicitly reflects the same concept by directing a court to consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii) (effective Dec. 1, 2018). In evaluating the effectiveness of a proposed method, a court's first priority should be to distribute funds directly to the injured parties in the class. "[T]here is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means." *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997). Only if a court finds that there is no feasible non-arbitrary way to distribute funds to class members should it consider approving *cy pres* relief.[2]

The decision below concluded that the settlement fund was "non-distributable" because "each class member's individual recovery would have been '*de minimis*.'" Pet. App. 8-9. But the court expressly refused

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[2] Petitioners briefly endorse (Pet. Br. 44) the prospect of allocating funds to class members by "random lottery distribution." Petitioners do not explain why a truly random distribution of settlement funds would be "reasonable" under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result in greater relief to the class as a whole than a properly tailored *cy pres* award.

to consider potential "alternatives" to an all-*cy pres* distribution, and its analysis of the *cy pres* relief consisted of little more than dividing the available settlement funds by the total number of class members. *Id.* at 9. That cursory approach is flawed, because it is rare for more than a small percentage of class members in large consumer class actions to submit claims. See *Pearson*, 772 F.3d at 782. A court performing a feasibility inquiry must therefore conduct a "vigilant and realistic" analysis, considering factors such as the claims rate for similar class-action settlements, alternative mechanisms for providing notice and processing claims, the possibility of additional distributions to class members who have already submitted claims, and other mechanisms for providing relief directly to class members. *Id.* at 787; see *ALI Principles* § 3.07 cmt. b, at 218-219; *Baby Prods.*, 708 F.3d at 174. For example, if the average claims rate in a class action like this one were 1%, the average payout to each class member would not be $0.04—as the lower courts calculated on an unstated assumption of 100% claims participation, see Pet. App. 9—but rather $4.00. It might well have been economically feasible to distribute that amount, which would have provided direct relief to the class members and eliminated the need for resort to second-best relief through *cy pres*.

c. Cy pres distributions should be discounted in awarding attorney's fees

A third important limitation on *cy pres* relief involves attorney's fees. As explained above, one of the central risks presented by *cy pres* settlements is that class counsel and defendants will collude to reach a settlement that "increase[s] a settlement fund, and with it attorney's fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. Relatedly, the

prospect of collecting attorney's fees based on *cy pres* distributions may provide incentives for class counsel to bring class actions with little or no actual claim value that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class." *Dennis*, 697 F.3d at 868 (vacating settlement under which the defendant would donate $5.5 million of its products to charity, thereby "assigning a dollar number to the fund that is fictitious" for purposes of calculating attorney's fees); cf. *International Precious Metals Corp.* v. *Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari) (warning that fee awards disconnected from "the actual distribution to the class" could "encourage the filing of needless lawsuits where * * * the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery").

Rule 23 therefore requires close judicial scrutiny of attorney's fees in class-action settlements. Under Rule 23(e)(2), a court must assess any proposed award of attorney's fees in determining whether the settlement is "fair, reasonable, and adequate." See *Newberg* § 13:61, at 506 ("If the fees set in the settlement agreement appear unrealistically high, that provision casts doubt on the settlement."). Indeed, the 2018 amendments to Rule 23(e) expressly require courts to consider "the terms of any proposed award of attorney's fees." Fed. R. Civ. P. 23(e)(2)(C)(iii) (effective Dec. 1, 2018). In addition, even when fees are "authorized * * * by the parties' agreement," Rule 23(h) permits a court to award fees only if they are "reasonable." Fed. R. Civ. P. 23(h); see Fed. R. Civ. P. 23 advisory committee's note (2003

Amendment) (explaining that "[a]ctive judicial involvement" is necessary to ensure that fee awards are "fair and proper").

To be fair and reasonable, a fee award calculated as a percentage of a settlement fund must reflect the settlement's benefit to the plaintiffs. After all, the premise of that calculation is that "the appropriate benchmark" for the fee is "the amount of the benefit conferred." 1 Alba Conte, *Attorney Fee Awards* § 2:5, at 67 (3d ed. 2004). As the Advisory Committee has explained, "[f]or a percentage approach to fee measurement," a "fundamental focus is the result actually achieved for class members." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendment); see *ibid.* (urging courts to "ensure that" alternatives to monetary relief to class members "have actual value to the class" before awarding attorney's fees). A *cy pres* distribution, however, achieves at best an indirect benefit for the class, because the money is paid to a third party, not to the individuals who have allegedly suffered injuries. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. Because "[t]he class benefit conferred by cy pres payments is indirect and attenuated," it is "inappropriate to value cy pres on a dollar-for-dollar basis." *Ibid.* (citation omitted).

Congress has endorsed that approach in a related context. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(A), 119 Stat. 4, includes a finding that "[c]lass members" are "harmed" when "counsel are awarded large fees, while leaving class members with * * * awards of little or no value." Congress implemented that finding by, *inter alia*, restricting attorney's fee awards in class-action settlements that provide relief

through coupons—a form of relief that, like *cy pres*, does not provide direct monetary compensation for plaintiffs' alleged injuries. Specifically, Congress provided in 28 U.S.C. 1712(a) that the calculation of attorney's fee awards may not be based on the value of unredeemed coupons, which do not provide a "tangible, nonspeculative benefit to the class members." S. Rep. No. 14, 109th Cong., 1st Sess. 32 (2005). Congress further provided that "the value of unclaimed coupons" may be distributed to "charitable or governmental organizations, as agreed to by the parties," but that "any proceeds" of such a *cy pres*-like distribution "shall not be used to calculate attorneys' fees." 28 U.S.C. 1712(e).

A court calculating attorney's fees could account for the second-best nature of *cy pres* relief in any of several ways. First, if this Court declines to adopt the redressability and infeasibility limitations on *cy pres* relief outlined above—*i.e.*, that *cy pres* distributions may be approved only if they redress plaintiffs' specific asserted injuries and only if non-arbitrary direct distributions to class members are infeasible—then the *cy pres* component of a settlement's value should be deducted entirely in calculating attorney's fees, because the *cy pres* relief may not have produced any benefit for the class. Alternatively, a court could disregard the settlement value as a basis for attorney's fees and instead calculate attorney's fees by the lodestar method. Cf. 28 U.S.C. 1712(a) and (b) (requiring attorney's fees in coupon settlements to be calculated by deducting unredeemed coupons or by the lodestar method).

If, however, a court concludes after careful examination that *cy pres* relief is permissible because it redresses plaintiffs' specific asserted injuries and non-arbitrary direct distribution to the class is infeasible, the court

could appropriately award attorney's fees based in part on the *cy pres* distribution. But even in that circumstance, the court should discount those fees, "because cy pres payments * * * only indirectly benefit the class." *ALI Principles* § 3.13 cmt. a, at 205. To "give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class," *ibid.*, would risk undermining the principle that direct distributions are the "very best" form of relief, while *cy pres* distributions are necessarily "next best," *Klier*, 658 F.3d at 475; see *Baby Prods.*, 708 F.3d at 178. Discounting fees for *cy pres* distributions—even permissible ones—would "better align the interests of class counsel and the class," and would "give class counsel a personal, financial incentive to push hard to get more money into the hands of individual claimants." Wasserman 137.

CONCLUSION

The Court should vacate the judgment below and remand for the lower courts to address plaintiffs' standing or to reconsider the *cy pres* settlement under the principles outlined here.

Respectfully submitted.

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APPENDIX

1. Fed. R. Civ. P. 23 provides in pertinent part:

Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * * * *

(h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for

motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

2. Fed. R. Civ. P. 23(e) (effective Dec. 1, 2018) provides in pertinent part:

Class Actions

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

3. 18 U.S.C. 2702(a) provides:

Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of

a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

4. 18 U.S.C. 2707(a)-(c) provides:

Civil action

(a) CAUSE OF ACTION.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) DAMAGES.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

5. 28 U.S.C. 1712 provides:

Coupon settlements

(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of

coupons to class members and also provides for equitable relief, including injunctive relief—

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

6. 28 U.S.C. 1715 provides in pertinent part:

Notifications to appropriate Federal and State officials

(a) DEFINITIONS.—

(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term "appropriate Federal official" means—

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) APPROPRIATE STATE OFFICIAL.—In this section, the term "appropriate State official" means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not

subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of—

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

* * * * *

(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).